IN THE SUPREME COURT OF THE UNITED STATES

October Term 1960

No. 155

MICHIGAN NATIONAL BANK, a banking association organized under the laws of the United States,

Appellant,

NATIONAL BANK OF WYANDOTTE, THE FIRST NATIONAL BANK (THREE RIVERS, MICHIGAN), COMMERCIAL NATIONAL BANK OF IRON MOUNTAIN, THE NATIONAL BANK OF JACKSON, , and THE FIRST NATIONAL BANK AND TRUST COMPANY OF KALAMAZOO, banking associations organized under the laws of the United States,

Intervening Plaintiffs,

vs.

STATE OF MICHIGAN, DEPARTMENT OF REVENUE OF THE STATE OF MICHIGAN, and LOUIS M. NIMS, STATE COMMISSIONER OF REVENUE,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

Brief of Appellant Opposing Appellee's Motion to Dismiss or Affirm

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In its Motion to Dismiss or Affirm, appellee advances a series of propositions which are basically and fundamentally erroneous.

The Decision of the State Court is not Conclusive upon this Court

Clearly contrary to the rulings of this Court is appellee's proposition (Br.* 36-38) that the decision of the state court is here **conclusive,**** and that this Court is foreclosed from reviewing the substantial, important and far-reaching Federal question raised.

It was undisputedly recognized by the courts below that there was an important, basic federal question here involved; that the question was duly raised by appellant, and that it was the only question in the case.[1]

Contrary to appellee's suggestion, surely this Court is not foreclosed by the state court's decision from a review of this Court's own decisions or from determining what the law is or should be upon any Federal question raised. Furthermore, whether the decision of the court below on this Federal question (and corollaries thereto) be regarded as a decision based on findings of fact or conclusions of law, or both, it is clear that this Court is not concluded from reviewing the facts in order to correctly apply the law. As was said in *First National Bank of Hartford* v. *Hartford*, 273 U.S. 548, 552; 71 L. Ed. 771:

> "The validity of the tax complained of depends upon whether or not the moneyed capital in the state thus favored is employed in such a manner as to bring it into substantial competition with the business of national banks . . . The question is thus a mixed one of law and

*"Br" refers to appellee's "Motion to Dismiss or to Affirm."

**Emphasis throughout is that of appellant, unless otherwise indicated.

[1]358 Mich. 611, 614 (Jurisdictional Statement 8; 45b); see Trial Court opinion (Jurisdictional Statement 2b, and 7b where the Court particularly noted that "this question [is] of importance to the states, the national banks and the savings/building and loan associations.")

> fact, and in dealing with it we may review the facts in order correctly to apply the law . . . Also, as the case is brought here from a state court for review on the ground that a federal right there set up was denied, **this Court is not concluded by a finding of the state court** that the asserted right is without basis in fact."

See *First National Bank of Guthrie Center* v. *Anderson*, 269 U.S. 341, 348; 70 L. Ed. 295, 302.

The Michigan tax is discriminatory within the meaning of R. S. 5219.

R. S. 5219 clearly establishes the basis of comparison for determining discrimination. When the tax, as here, is upon national bank shares,

> " . . . the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens . . ."

This necessarily involves, as this Court has recognized, a comparison between the tax burden imposed upon national bank shares and that imposed upon "other moneyed capital in the hands of individual citizens." It is not disputed in this case that shares in savings and loan associations are "moneyed capital in the hands of individual citizens."

In *People* v. *Weaver*, 100 U.S. 539, 545; 25 L. Ed. 705, the factors to be considered in making the comparison are described:

> "Congress had in its mind an **assessment**, a **rate** of assessment, and a **valuation**; and, taking all these together, the taxation on these shares was not to be greater than on other moneyed capital."[2]

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[2]Emphasis that of the Court.

In *Weaver*, the rate was the same, but the valuation was different. "Other moneyed capital" was valued on a lower basis, and the result was a discrimination prohibited by R. S. 5219. Here, the converse is true, the basis of valuation of national bank shares and savings and loan shares is similar[3], but the rate of assessment is different, national bank shares being taxed at a rate of 8 to 13 times greater than the tax imposed on "other moneyed capital" (shares of savings and loan associations). The result is the same, a discrimination prohibited by R. S. 5219.

This Court said in *Pelton* v. *National Bank*, 101 U.S. 143, 146; 25 L. Ed. 901:

> "It is sufficient to say that we are quite satisfied that any system of assessment of **taxes which exacts** from the owner of the shares of a national bank **a larger sum in proportion to their actual value** than it does from the owner of other moneyed capital **valued in like manner,** does tax them at a greater rate within the meaning of the act of Congress."

Where, as here, the bank shares and "other moneyed capital" are "valued in like manner," the only remaining factor for consideration in determining whether there is discrimination under R. S. 5219 is the rate of tax imposed upon the bank shares as compared with the rate imposed upon "other moneyed capital." This is precisely what this Court did in *Merchants' National Bank of Richmond* v. *City of Richmond*, 256 U.S. 635; 65 L. Ed. 1135 (tax on bank shares approximately 3.5 times greater than tax on other competing moneyed capital); *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239; 76 L. Ed. 265 (approximately 6 times greater); *Minnesota* v. *First National Bank of St. Paul*, 273 U.S. 561; 71 L. Ed. 774 (approximately 8 times greater); and *First National Bank of Guthrie Center* v. *Anderson*,

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[3]See Jurisdictional Statement, pp. 25-6, and footnotes 9-12.

269 U.S. 341; 70 L. Ed. 295 (approximately 29 times greater).

In the case at bar, where valuation is on the same basis, but the tax on national shares is at a greater rate, there are no problems such as appellee suggests relative to "total tax burden," the lack of "equivalent tax burden," greater "tax impact" or lack of "substantial tax equivalence." Such problems arise only in cases where there are different measures or methods of valuation[4] or entirely different methods or systems of taxation,[5] as between national bank shares and other moneyed capital.

Appellee seeks to avoid the plain and obvious meaning of R. S. 5219, as above described, through the use of two "tax burden" comparative tests, not consistent with nor permitted by R. S. 5219. Appellee, in effect, urges the Court to regard the tax on bank shares as a tax on the **total assets** (without deducting liabilities) of the bank as compared with total assets of savings and loan associations, and so regarded, appellee claims that the tax is not discriminatory. There are two things wrong with this proposition. It ignores the plain language of the statute, which permits a tax on **shares,** not on **total assets,** of a national bank, and it studiously avoids any discussion of *Minnesota* v. *First National Bank,* 273 U.S. 561; 71 L. Ed. 774, which is directly to the contrary. In *Minnesota*, the state likewise urged an asset comparison and the Court explicitly rejected it, saying (273 U.S. 564):

> "This argument ignores the fact that the tax authorized by §5219 is against the holders of the bank shares and is **measured by the value of the shares,** and **not by the assets of the bank without deduction of its liabilities,** *Des Moines National Bank* v. *Fairweather,* 263 U.S. 103, and

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[4] *People* v. *Weaver,* supra.

[5] *Tradesmen's National Bank* v. *Oklahoma,* 309 U.S. 560; 84 L. Ed. 947.

> that the **bank share tax must be compared with the tax assessed on competing moneyed capital of individuals** invested in credits, or the tax on capital invested by individuals in the shares of corporations whose business competes with that of national banks."

Nor is appellee's second suggested basis for comparison valid. Appellee contends that the tax burden should be related to "the reserves and undivided profits of the savings and loan associations [and] with the actual value of national bank stock" [**capital,** surplus, and undivided profits], erroneously **excluding** the substantial amount invested in shares of **capital** of the savings and loan associations.[6] This comparison is predicated upon appellee's erroneous assertion that the investment in a savings and loan association is a deposit-debt rather than a share-equity.

Initially it is clear that an investment in a savings and loan association is not a deposit-debt, but is a share of stock invested for profit, in a privately managed, mortgage business corporation.

In *Michigan Savings and Loan League* v. *Finance Commission* (1956), 347 Mich. 311, 319; 79 N.W. 2d 590, the plaintiff:

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[6]As to this manner of comparing "tax burden", appellee's own witness, Professor Woodworth, stated: "I rejected that in my thinking as a proper basis of comparison." (863a).

Appellee cites *People* v. *Weaver*, 100 U. S. 539; 25 L. Ed. 705, and *Davenport Bank* v. *Davenport Board of Equalization*, 123 U. S. 83; 31 L. Ed. 94, in support of the foregoing comparison. However, as pointed out on page 3, supra, *Weaver* does not support appellee, but does support appellant. Nor does *Davenport* support the proposition that the capital invested in savings and loan association shares may be excluded in valuing other moneyed capital. In *Davenport*, which involved a stock corporation savings bank (unlike those in New York and Massachusetts which had no capital stock), this Court held: ". . . the same rate per cent is assessed upon the capital of the savings banks as upon the shares of the national banks."

> " . . . argued, **in substance,** that investments in savings and loan associations of the character involved in this case **should not be regarded as stock purchases,** that the investor **is actually depositing funds for safekeeping,** that the transaction is **analogous to a deposit in the savings department of a bank** . . ."[7]

Rejecting this contention, the Michigan Supreme Court held (322):

> "This Court has recognized that investors in savings and loan associations are subscribers to, or purchasers of, stock therein . . .
>
> " . . . It may not accept deposits in the sense that such are received by banks . . ."[8]

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[7]*There,* the Attorney General successfully opposed such contention. *Here,* he now argues directly to the contrary.

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[8]Unlike a depositor, a shareholder in a savings and loan association is not a creditor. He is a shareholder in a corporation engaged in the mortgage business. He assumes the risk of the venture. The Michigan statute expressly provides that he is a shareholder—and may not be a depositor. The Michigan and Federal statutes expressly prohibit savings and loan associations from receiving deposits. Mich. C. L. 1948, Sec. 489. 37; M. S. A. 1957 Rev., Sec. 23.580; Fed. Code Ann., Sec. 1464 (b). A depositor receives a contractually fixed rate of interest, regardless of whether the bank operates at a profit or loss. A shareholder in a savings and loan association receives dividends, if declared, the payment and amount of which are dependent upon whether the operations of the corporation are profitable. Shareholders in a savings and loan association vote for and ultimately control the operations of the association; whereas depositors have no voice in the operations of a bank. Upon liquidation, shareholders in a savings and loan association share pro rata in the entire equity in the corporation, capital, surplus and undivided profits. Upon liquidation, a depositor receives merely repayment of his fixed debt.

Appellee, relying on dicta in *Amoskeag Savings Bank* v. *Purdy,* 231 U. S. 373; 58 L. Ed. 274 ignores the fact that *Amoskeag* related to New York savings banks, which had no shareholders but only deposit-debtors.

Moreover, even if shareholders in savings and loan associations were depositors, appellee's comparison is not permissible under R. S. 5219. The Federal statute requires that national bank shares shall not be taxed at a greater rate than **other moneyed capital** in the hands of **individual citizens.** Whether shareholder (as appellant submits) or depositor (as appellee contends), the investment in savings and loan associations by individuals is other moneyed capital, within the meaning of R. S. 5219. *Mercantile Bank* v. *New York,* 121 U.S. 138, 157; 30 L. Ed. 895. Since this moneyed capital is taxed at a substantially lower rate than national bank shares, R. S. 5219 is violated.

Throughout, appellee urges (Br. 13, 19), and the lower court held, that the Michigan tax is not discriminatory nor violative of R. S. 5219, because—

> "Michigan's tax treatment . . . does not evidence an intent to create or foster a hostile or unfriendly discrimination against national banks."

In *Hartford,* supra, the same contention was made by the appellee and had been sustained by the Supreme Court of Wisconsin. However, this Court unequivocally rejected this position, holding (273 U.S. 560):

> "But a consideration of the entire course of judicial decision on this subject can leave no doubt that state legislation and **taxing measures which by** their **necessary operation and effect discriminate** against capital invested in national bank shares in the manner described **are** intended to be **forbidden."**

Michigan cannot exempt or preferentially tax competing moneyed capital (shares in savings and loan associations) without violating R. S. 5219.

Appellee urges that even though shares in savings and loan associations are "other moneyed capital in the hands

of individual citizens of such State coming into competition with the business of national banks," within the meaning of R. S. 5219, and even though shares of national banks are taxed "at a greater rate," within the meaning of R. S. 5219, the State of Michigan has, nevertheless, not violated R. S. 5219. To state such a proposition is virtually to answer it.

Appellee cites (Br. 21) several cases of this Court wherein appellee claims the so-called "partial exemption" rule has been applied. These cases are not here applicable. See appellant's Statement as to Jurisdiction (pp. 28 et seq). We respectfully submit that no doctrine of this Court permits a state to discriminate against national bank shares in favor of other moneyed capital employed under private management, for profit, in competition[9] with a substantial phase of the business of national banks.

The Home Owners Loan Act of 1933 does not Repeal R. S. 5219 by Implication.

R. S. 5219 was enacted to prevent states from discriminating against national bank shares in favor of other moneyed capital employed in substantial competition with the business of national banks. *Hartford*, supra. Congress provided for no exemptions, exclusions or exceptions of any other competing moneyed capital.

Notwithstanding, appellee erroneously urges (Br. 4-7) and the lower Court held, that the Home Owners Loan Act of 1933 **by implication** evidences a Congressional intent to exclude shares in savings and loan associations from the

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[9]Appellee also places great reliance upon the circuit court case of *Hoenig* v. *Huntington National Bank*, 59 F. 2d 479, certiorari denied 287 U.S. 648 (Br. 25-29). Contrary to appellee's contention, the addendum attached hereto conclusively shows and the record in *Hoenig* demonstrates, that, unlike the instant case, savings and loan associations in *Hoenig* were not in substantial competition with the **then** business of national banks in loaning money on the security of residential mortgages.

operation of R. S. 5219. There is, however, nothing in the Home Owner Loan Act or its Congressional history, that supports such a conclusion. The Act provides merely that states may not impose a greater tax on federal associations than that imposed upon like local associations. The Act is **silent** as to **how shares in federal associations** shall be taxed by a State and in no way prescribes **how state associations or their shares shall be taxed.** Such Cogressional prohibition is in no way inconsistent with the equally clear injunction of R. S. 5219 in respect to shares of national banks.

In protecting federal savings and loan associations from discrimination in favor of like state institutions, the 1933 Act in no way relieves a state from the obligation to safeguard national bank shares from state discrimination in favor of other moneyed capital (whether or not invested in state or federal savings and loan associations), when, as here, in 1952 and at the present time such moneyed capital is employed in keen competition with a substantial phase of the business of national banks. Certainly the Home Owners Loan Act does not expressly repeal R. S. 5219, and, contrary to the lower court's conclusion, no partial repeal of R. S. 5219 should be implied. As this Court has often held, it does not look with favor upon a claim of repeal of important legislation by implication.

There is Competition Within the Meaning of R. S. 5219

Appellee urges a proposition with regard to the question of competition (Br. 30-35) which, if sustained, as it was by the lower courts, would eliminate the protection afforded by R. S. 5219 in the taxing of national bank shares. Appellee contends as a matter of **law** that there cannot be substantial competition because savings and loan associations operate in a "narrow and restricted field" and do not perform the "major or characteristic functions" of the national banking business.

This proposition ignores the compelling evidence of economic competition summarized at pp. 10-14 of Appellant's Jurisdictional Statement. This so-called "narrow and restricted field" of home mortgage financing is in fact one of the major phases of appellant's business and of the business of all national banks in Michigan. The investment of capital by savings and loan associations in that business is even larger. That this competition is "substantial" needs no showing as to its relation to the "total financial business" in Michigan during the tax year in question, as appellee suggests (Br. 9). The pivotal consideration is whether the capital thus employed is "substantial in amount when compared with the capitalization of national banks". *Hartford*, supra, p. 558. This has been amply demonstrated (Appellant's Jurisdictional Statement, p. 15).

Moreover, the "major or characteristic functions" of a national bank, according to appellee, are its so-called "monetary functions." Serious competition cannot develop, according to appellee, except as respects these functions.[10] But even a cursory examination of the so-called "monetary functions" reveals that no institution, other than national and state

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[10]The monetary functions, according to appellee's witness, Professor Woodworth, are: (a) providing a safe and uniform currency; (b) serving as a depository for the federal government and assisting the treasury in its fiscal operations, and (c) providing a safe check book money for business and the general public (843a).

However, although the Professor characterized the so-called "monetary functions" of a bank as "primary" and the making of loans and discounts as "secondary functions", he readily admitted that the primary or monetary functions earned little money for the bank and that for it to exist and survive, it must earn most of its money by making loans and discounts (881a, 882a). Clearly, unless R. S. 5219 protects national banks in the performance of their "secondary functions"—loans and discounts—they would be unable to perform their primary or any other functions.

banks, perform these functions. The result is to limit competition to state banks, a proposition which this Court and Congress have consistently rejected.

Appellee also poses the question, "How can fundamentally different institutions, which cannot be compared, be said to be in substantial competition' . . . ?" This Court answered that question in *Hartford* when it said (273 U.S. 557):

> "Competition in the sense intended [by R. S. 5219] arises **not from the character of business** of those who compete **but** from **the manner of the employment** of the capital at their command."

Conclusion

In recent years the loaning of money on the security of residential real estate mortgages has become a vital and important part of the business of national banks. In 1952, this business amounted to 40% of the total loans and discounts of appellant bank, exceeded 20% of its total assets, and provided 26% of its total interest income.

As the Comptroller of Currency of the United States recently testified before Congress:

> " . . . banks are finding themselves more and more in competition with . . . Federal and State chartered savings and loan associations . . . [they] are zealous and highly effective competitors . . . for real estate mortgage loans . . . It is our view that any failure to take into consideration [such] competition . . . when considering the subject of bank competition would indicate serious lack of knowledge of basic factors important to banking today and disregard of the elements that go into a determination of the competitive situation in which commercial banks function."

See Statement as to Jurisdiction, pp. 10-14; 38-41.

It is unthinkable that in the light of such development, discriminatory taxation by a state upon shares of national banks in favor of other moneyed capital in the form of shares of savings and loan associations should be countenanced under R. S. 5219.

As we stated at the outset of this case, and as was recognized by the Michigan Supreme Court (358 Mich. 611, 618):

"Appellant's position is set forth in its brief as follows:

> 'This is not a case of tax avoidance or claimed immunity by appellant. * * * The singularly important and impelling object of this case is to assure tax equality with competitors. The powerful and rapidly growing savings and loan associations (or their shareholders) should be taxed at the same rate as shares in national banks in Michigan, as required under R. S. §5219—regardless of what that rate may be'."

We respectfully submit that appellee's motion to dismiss or to affirm be denied and that the Court note jurisdiction to hear and determine the basic Federal question here involved, or, in the alternative, as in *Securities and Exchange Comm.* v. *Otis & Co.*, 338 U.S. 843; 94 L.Ed. 516, reverse the judgment of the lower court.

Respectfully submitted,

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MICHIGAN NATIONAL BANK

July 29, 1960.

ADDENDUM

Hoenig v. Huntington

Pages A-D

ADDENDUM

Hoenig v. Huntington, 59 F. 2d 479 (1932)

Contrary to appellee's claim that *Hoenig* involved actual, substantial competition between national banks and savings and loan associations in Ohio similar to the competition shown in the instant case, the record in *Hoenig* clearly refutes such claim.

In 1926-7 (the tax years involved in *Hoenig*), not only were national banks then prohibited by law (Sec. 24; Federal Reserve Act) from loaning money on the security of residential mortgages for a term in excess of one year, but every banker who there testified was obliged on cross-examination to admit that:

"We have no direct loans on homes" (Archer);

"We do not fill that demand" (Huntington);

"As a rule we do not cater to them" (Stein).

The record in *Hoenig* shows that only 7/10 of 1% of the plaintiff banks' loaning business in Columbus, Ohio, consisted of real estate mortgage loans, and even that minute percentage was for one year or less, compared to the savings and loan associations' mortgages of 10 to 12½ years. With respect to the 10 to 12½ year loans, the Court of Appeals in *Hoenig* held that **national banks "do not . . . invest their funds generally in this manner"** (59 F. 2d 482).

In contrast, in the instant case, about 40% of plaintiff bank's loaning business are residential mortgage loans on substantially the same terms as those of the associations.

Hence, in the field in which Columbus, Ohio building associations primarily invested their funds, there could be no real competition as a matter of law, and there was none as a matter of fact. See chart, infra, pp. C and D.

For the foregoing reasons, appellant submits that *Hoenig* was properly decided **on its facts,** and certiorari was properly denied for the same reason which the Court recognized in *First National Bank of Shreveport* v. *Louisiana*, 289 U.S. 60; 77 L. Ed. 1030—lack of factual competition.

C

"Hoenig" Facts

Total Loans of all National Banks in Columbus, Ohio Including Plaintiff's	Total Loans of all building and loan associations in Columbus, Ohio
$56,133,000 (Hoenig record, p. 36)	$90,544,234 (Hoenig record, p. 38)

Total Residential Mortgage Loans	Total Residential Mortgage Loans
$399,000 (Hoenig record, p. 36)	$89,797,515 (Hoenig record, pp. 38, 39)

Average Term of Residential Mortgage Loans	Average Term of Residential Mortgage Loans
1 year maximum term (12 U.S.C. 371) No testimony as to average term	16½ to 12½ yrs. (Hoenig record, p. 39)

% of Residential Mortgage Loans to Total Loans
7/10 of 1%

D

Facts in This Cause

Total Loans of Plaintiff Bank in 7 Cities	Total Loans of all savings and loan associations in 7 Cities
$148,304,387 (Exh. 3)	$97,584,865 (Appellant's Jurisdictional Statement, p. 13)

Total Residential Mortgage Loans	Total Residential Mortgage Loans
$59,737,315 (Exh. 3) (Including $8,317,457 home improvement loans.)	$97,584,865* (Appellant's Jurisdictional Statement, p. 13)

Average Term of Residential Mortgage Loans	Average Term of Residential Mortgage Loans
Conventional—10-yrs. FHA / VA } 20-25 yrs. (Appellant's Jurisdictional Statement, p. 12)	Conv.—11-12 yrs. FHA / VA } 20-25 yrs. (Appellant's Jurisdictional Statement, p. 12)

% of Residential Mortgage Loans to Total Loans
40%

*Virtually all loans were secured by residential real estate, although some commercial loans were made.